

No. 84-616

In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD R. MULROY, d/b/a MULROY DAIRY FARMS,
PETITIONER

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that amendments to the dairy price support program effected by the Omnibus Budget Reconciliation Act of 1982 (the 1982 Budget Act), Pub. L. No. 97-253, 96 Stat. 763 *et seq.*, establish an unlawful delegation of taxing authority to the Secretary of Agriculture, result in confiscation of private property and were beyond the power of Congress to regulate interstate commerce. In addition, petitioner apparently claims that the dairy price support provisions of the 1982 Budget Act were passed in violation of congressional rules or that those rules were waived in a manner that offends separation of powers and that the Secretary has misinterpreted the Act.

1. a. Pursuant to Section 201(c) of the Agricultural Act of 1949, 7 U.S.C. 1446(c), the Secretary of Agriculture assures an adequate supply of milk by supporting the price

of milk. Price support is achieved by having the Commodity Credit Corporation, a corporate arm of the Department of Agriculture, purchase unlimited quantities of surplus milk products at preestablished prices. In 1982, Congress became alarmed at the immense annual cost of the dairy price support program (over \$2.3 billion in 1982) and the large quantities of milk apparently being produced simply for sale to the government. Accordingly, in the 1982 Budget Act, Congress adopted significant reforms of the dairy price support program. Congress established a minimum support price for milk and granted the Secretary authority to institute a program of deductions applicable to the proceeds of sale of all milk marketed commercially by producers in the United States. The Secretary was authorized to impose these deductions only if government purchases of surplus milk products were expected to reach specified levels in a given year. 7 U.S.C. 1446(d).

In September 1982, the Secretary determined that government purchases of surplus milk products would more than double the trigger level set by the 1982 Budget Act. The Secretary therefore instituted the authorized deduction program. 47 Fed. Reg. 53831 (1982). Following litigation in the United States District Court for the District of South Carolina, see *South Carolina v. Block*, 717 F.2d 874 (4th Cir. 1983), cert. denied, No. 83-1215 (Mar. 5, 1984), the deduction program went into effect in April 1983. 48 Fed. Reg. 11253. That program remained in effect until December 1983, when it was superseded by Title I of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. No. 98-180, 97 Stat. 1128 *et seq.* In the 1983 Act Congress made the deduction program mandatory, and provided that nothing in the new Act should "affect in any manner the collection or enforcement of any deduction from the price of milk previously implemented by the Secretary" (§ 102(a), 97 Stat. 1129).

b. Petitioner is a dairy farmer in New York who produces and processes milk, which he sells locally without a middleman (Pet. App. A9). He brought this action in the United States District Court for the Northern District of New York asserting that the Secretary's milk deduction program was unconstitutional and contrary to statute in numerous respects (see, e.g. Pet. App. A13-A14 (listing contentions)). In May 1983, the district court rejected petitioner's constitutional contentions and several of his statutory claims (Pet. App. A9-A27). In November 1983, the district court rejected petitioner's remaining claims, which raised administrative law issues, and granted summary judgment to the government (Pet. App. A6-A8).

The court of appeals affirmed (Pet. App. A1-A3) on the basis of the district court's two opinions, citing as well the "thorough opinion" (Pet. App. A3) of the United States Court of Appeals for the Fourth Circuit in *South Carolina v. Block, supra*, which had upheld the milk deduction program against constitutional and administrative law attack, and *Mandel v. Block*, 573 F. Supp. 1522 (S.D.N.Y. 1983).

2. The decision of the court of appeals is clearly correct and does not conflict with any decision of this Court or any other court. Review by this Court is plainly unwarranted.

a. Petitioner contends (Pet. 11-12) initially that the 1982 revisions of the dairy price support program impermissibly gave effect to an invalid legislative veto. Petitioner's contention apparently is based on Congress's decision, in enacting the 1982 Budget Act, to waive its internal procedural rules, set out in the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 *et seq.* The latter Act, however, clearly indicates that its procedural provisions represent an exercise of Congress's rulemaking powers. See Congressional Budget and Impoundment Control Act of 1974 § 904(a)(1), 2 U.S.C. 621 note. Thus,

these rules for governing legislative procedures are subject to change, waiver, or suspension at the pleasure of Congress. See Congressional Budget and Impoundment Control Act of 1974 § 904(a)(2), 2 U.S.C. 621 note. In this instance, Congress waived the applicable procedures. Because Congress merely waived its own internal rules, which need not be established by legislation enacted in conformity with the bicameralism requirement and Presentment Clauses of Article I, Section 7 of the Constitution, *INS v. Chudha*, No. 80-1832 (June 23, 1983), is wholly inapposite here. See *id.* slip op. 35 n.20.¹

b. Petitioner contends (Pet. 12) that he has standing to argue that the 1982 Budget Act was not passed according to proper congressional procedures. Because the underlying claim (discussed above) has no merit, there is no reason to consider any standing issue. Moreover, petitioner's contention is barred by the "enrolled act rule." See *Field v. Clark*, 143 U.S. 649, 673 (1892); *Rainey v. United States*, 232 U.S. 310, 317 (1914).

c. Petitioner also asserts (Pet. 13-14) that the 1982 milk deduction program was an unconstitutionally "confiscatory" or otherwise invalid tax. Petitioner's argument ignores the fact that the milk deduction program merely reduced the federal subsidy that kept milk prices set at an artificially high level, benefiting all milk producers. This Court has held that assessment programs serving a regulatory purpose similar to the milk deduction program are not to be regarded as tax provisions, and they accordingly are not

¹The milk price support program modifications established by the 1982 Budget Act have been superseded by subsequent legislation. See page 2, *supra*. The 1983 legislative revision of the milk price support program would appear to ratify the deduction program established under the 1982 Budget Act. In any event, the procedures by which the 1982 program was established do not, in the circumstances, present any question of continuing importance.

subject to any constitutional restraints on taxing authority. See *Head Money Cases*, 112 U.S. 580 (1884); *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897); *Millard v. Roberts*, 202 U.S. 429 (1906). The courts of appeals have uniformly rejected arguments such as those raised by petitioner, *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943); *Morrison Milling Co. v. Freeman*, 365 F.2d 525 (D.C. Cir. 1966), cert. denied, 385 U.S. 1024 (1967); *Nabisco Inc. v. United States*, 599 F.2d 415, 422 n.2 (Ct. Cl. 1979), and the Fourth Circuit rejected precisely the arguments renewed here in *South Carolina v. Block*, *supra*.

Petitioner's reliance (Pet. 14) on *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), and *FPC v. New England Power Co.*, 415 U.S. 345 (1974), is misplaced. In those cases, the Court held that a licensing fee or its equivalent imposed pursuant to the Independent Offices Appropriation Act, 1952, 31 U.S.C. 9701, must be commensurate with the value of the benefit received from the government by the party paying the fee. The milk deduction program, however, does not involve license fees exacted for the privilege of entering a particular activity and does not rest on the Independent Offices Appropriation Act; rather, the milk deduction program simply adjusted the level of the existing price supports that benefit all milk producers by means of a charge keyed to the volume of milk sold. The primary purpose of the milk deduction is regulatory (*South Carolina v. Block*, 717 F.2d at 887); it is not a revenue-raising measure in the guise of a license fee.

d. Petitioner next contends (Pet. 15-17) that his activities are outside the scope of Congress's authority to regulate commerce. This contention is insubstantial because petitioner engages in a class of activity that significantly affects interstate commerce. See *Wickard v. Filburn*, 317 U.S. 111, 127-128 (1942); *Perez v. United States*, 402 U.S. 146, 154 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 301

(1964); *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 568-569 (1939). Petitioner argues, however, that he is part of a small and commercially unimportant sub-class of milk producers, producer-handlers. But that sub-class accounts for roughly 1% of milk sales nationally (see Pet. App. A9), an amount equal to millions of dollars of sales, and thus accounts for a substantial share of the annual cost of the federal milk price support program (see page 2, *supra*). Accordingly, even petitioner's small sub-class has a substantial impact on interstate commerce. And it is irrelevant that petitioner himself may not sell any of his production to the Commodity Credit Corporation; he competes with these who do so, and receives a price from his customers supported by the milk price support program. See Pet. App. A19, A21; *Wickard v. Filburn*, 317 U.S. at 128.

e. Finally, petitioner alleges (Pet. 17-19) that the Secretary's deduction program rested on a misinterpretation of the 1982 Budget Act's milk price support provisions. Petitioner's contention is insubstantial. See *South Carolina v. Block*, 717 F.2d at 882-884; *Mandel v. Block*, 573 F. Supp. at 1526-1528; *National Farmers' Organization, Inc. v. Block*, 561 F. Supp. 1201, 1208 (E.D. Wisc. 1983). In any event, petitioner's contention is unavailing because Congress ratified the actions taken by the Secretary under the 1982 Budget Act when it mandated a deduction program in December 1983. See page 2, *supra*; H.R. Rep. 98-237, 98th Cong., 1st Sess. 18 (1983) ("[T]he Committee is of the view that the actions of the Secretary were in accordance with the law.").

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1984